STATE OF MICHIGAN

COURT OF APPEALS

TERESA DOMRASE,

Plaintiff-Appellant,

v

AUTO CLUB INSURANCE ASSOCIATION,

Defendant

and

WILLIAM ARTHUR LUCAS, CONNIE MARIE LUCAS, and SCOTT BASAR,

Defendants-Appellees.

UNPUBLISHED
December 30, 2003

No. 243726
Washtenaw Circuit Court
LC No. 00-000219-CK

Before: Talbot, P.J., and Owens and Fort Hood, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action following a jury trial. We affirm.

Plaintiff contends that the trial court should have granted her motion for a directed verdict on the issue of proximate causation. "When evaluating a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the nonmoving party, making all reasonable inferences in the nonmoving party's favor." *Locke v Pachtman,* 446 Mich 216, 223; 521 NW2d 786 (1994). "Where the evidence is such that reasonable jurors could honestly have reached different conclusions, the trial court may not substitute its judgment for that of the jury and the motion must be denied." *Berryman v K Mart Corp,* 193 Mich App 88, 91; 483 NW2d 642 (1992). This Court has stated that directed verdicts, particularly in negligence cases, are viewed with disfavor. *Id.* We review de novo the trial court's decision on such a motion. *Sniecinski v BCBSM,* 469 Mich 124, 131; 666 NW2d 186 (2003).

Regarding the issue of proximate cause, this Court has stated: "Proximate cause is that which operates to produce particular consequences without the intervention of any independent, unforeseen cause, without which the injuries would not have occurred." *Helmus v Dep't of Transportation,* 238 Mich App 250, 256; 604 NW2d 793 (1999). In order to find proximate cause, "it must be determined that the connection between the wrongful conduct and the injury is

of such a nature that it is socially and economically desirable to hold the wrongdoer liable." *Id.* "Although legal or proximate causation is often stated in terms of foreseeability, *Richards v Pierce*, 162 Mich App 308, 316-317; 412 NW2d 725 (1987), the question of whether there is proximate causation, like the question of duty, is essentially a problem of law." *Poe v Detroit*, 179 Mich App 564, 576; 446 NW2d 523 (1989). When a number of factors contribute to producing the plaintiff's injury, the defendant's negligence will not be considered a proximate cause of the harm unless it was a substantial factor in bringing about the injury. *Id.*

Plaintiff acknowledged that, following the July 1999 automobile accident at issue in this case, she was involved in a second vehicular accident in January 2000, in which she broke her clavicle, punctured a breast implant, and had to crawl through snow out of a ditch using her bare hands. While conceding that the January 2000 accident was a much more serious accident than the July 1999 accident, plaintiff claimed that her neck and back felt "basically the same" after this second accident and that it had "never gotten better." When confronted with the fact that she had told one of her doctors that the pain in her neck and back had increased after the second accident, plaintiff conceded that was true, but asserted that the pain had been bothering her after each of the accidents.

Plaintiff's primary physician, Dr. Brian Chodoroff, testified that plaintiff's symptoms, in association with findings such as muscle spasms, strongly suggested that there was a relationship between the July 7, 1999 accident and the continuing presence of those spasms. However, Dr. Chodoroff also stated that he was unable to comment on whether the second vehicular accident in January 2000 affected plaintiff in a negative way, other than by causing a clavicular fracture. Dr. Chodoroff admitted that in a report that was made following plaintiff's February 1, 2000 office visit he stated that he was "uncertain" regarding the relationship between her present symptoms and her July 1999 accident. Dr. Chodoroff also admitted that he "[didn't] have a specific diagnosis that can be established to explain all of this woman's symptoms." Dr. Chodoroff further testified that a specific diagnosis was still not evident after subsequent examinations.

Defendants' neurologist, Dr. Frank Judge, testified that he was unable to find anything of an organic nature to substantiate plaintiff's complaints. Further, he observed that her muscle reactions during the examination were inconsistent with her demonstrated ability to walk or swing her arms normally while walking; he testified that this was "positive evidence" of "secondary gain" – that is, that plaintiff's pain complaints were motivated by the desire to gain some benefit by being ill. According to Dr. Judge, this motivation could be either intentional or unconscious.

Given the conflicting nature of this testimony, and reviewing all the testimony in this case and all legitimate inferences in the light most favorable to defendants, the nonmoving parties, *Sniecinski*, *supra* at 131, we conclude that the trial court did not err in denying plaintiff's motion for a directed verdict on the issue of proximate cause because reasonable jurors could have honestly reached the conclusion that plaintiff's injuries were not caused by the July 7, 1999 accident, but rather by the subsequent accident.

Plaintiff also contends that the trial court should not have granted defendant Basar's motion for a directed verdict on the issue whether there was a concert of action between Basar and Lucas that was the proximate cause of the accident. We disagree.

"A plaintiff may proceed on the theory of concert of action if he or she can prove 'that all defendants acted tortiously pursuant to a common design.'" *Cousineau v Ford Motor Co*, 140 Mich App 19, 32; 363 NW2d 721 (1985), quoting *Abel v Eli Lilly & Co*, 418 Mich 311, 338; 343 NW2d 164 (1984). "'Express agreement is not necessary, and all that is required is that there be a tacit understanding.'" *Id.*, quoting Prosser, Torts (4th ed), § 46, p 292. Our Supreme Court explained this concept by providing the following illustration:

> If three drivers join in a drag race, as a result of which one pedestrian is injured, all three may be held liable. Thus a legal fiction is created: all three drivers are found to be the cause in fact, although only one driver may have actually struck the pedestrian. [*Abel, supra* at 338.]

Plaintiff testified that the driver of the first truck, defendant Basar, passed her on a curve that was a no-passing zone. As he passed her, plaintiff stated that his arm was out the window and he was doing a "waving kind of gesture." According to plaintiff, the driver of the truck behind her, defendant Lucas, was acknowledging the wave. Plaintiff acknowledged on cross-examination that her claim of a concert of action was based on her conclusion that the defendants knew each other, that Lucas was tailgating her because he wanted to pass her and catch up to Basar, and that they were both late for a golf game.[1]

This Court must examine the above testimony and all legitimate inferences in the light most favorable to plaintiff. *Kubczak v Chemical Bank & Trust Co*, 456 Mich 653, 663; 575 NW2d 745 (1998). "If reasonable jurors could honestly have reached different conclusions, this Court may not substitute its judgment for that of the jury." *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003). Considering plaintiff's testimony, even viewed in a light most favorable to her, we conclude that no reasonable juror could have concluded that defendants Lucas and Basar "acted tortiously pursuant to a common design." *Cousineau, supra* at 32. Therefore, the trial court properly granted defendant Basar's motion for directed verdict on this issue.

Plaintiff also contends that the trial court erred in permitting defense counsel to cross-examine her on the issue of money damages. "The trial court has the discretion to control the questioning of witnesses, and we review its determination of the scope of cross-examination for an abuse of discretion." *Persichini v Beaumont Hosp*, 238 Mich App 626, 632; 607 NW2d 100 (1999). Plaintiff complains of the following question:

> *Q*. Ms. Domrase, you're asking this jury in this case to award you money for neck and back pain; is that correct?

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[1] Plaintiff explained: "I felt that they [defendants Basar and Lucas] were -- they knew each other. It was a conspiracy. They were going to the same place. I felt that they were playing a game racing or chasing each other."

Plaintiff's counsel objected on the basis that the question was improper, and the trial court ruled that this was a proper question. Defendant's counsel asked plaintiff the question again, and she stated, "I suppose that's true."

"Under MRE 611, a trial court has broad power to control the manner in which witnesses are examined." *Phillips v Mazda Motor Mfg (USA) Corp*, 204 Mich App 401, 415; 516 NW2d 502 (1994). MRE 611 provides:

> (a) The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.
>
> (b) A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. The judge may limit cross-examination with respect to matters not testified to on direct examination.

"Relevant evidence" is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." MRE 403.

Plaintiff's reliance on *Kakligian v Henry Ford Hosp*, 48 Mich App 325, 327-328; 210 NW2d 463 (1973), is misplaced because that decision is not binding precedent[2] and because it is distinguishable on its facts. In the present case, plaintiff was questioned regarding whether she was asking for money for her neck and back pain in order to impeach her credibility by demonstrating her pecuniary interest in the outcome, whereas in *Kakligian*, the motive was to appeal to the jury's bias. See *Backowski v Solecki*, 112 Mich App 401, 414; 316 NW2d 434 (1982) (the purpose of the testimony regarding an oral agreement between the defendant and the plaintiff was to impeach the defendant's credibility by demonstrating his pecuniary interest in the outcome). "The interest or bias of a witness goes directly to the question of his credibility and is never regarded as irrelevant." *Id.* Because we conclude that the above testimony was relevant to plaintiff's credibility and its probative value was not substantially outweighed by its prejudicial effect, the trial court did not abuse its discretion in allowing plaintiff to be briefly questioned on this issue.

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[2] *Fogarty v Dep't of Transportation*, 200 Mich App 572, 574-575; 504 NW2d 710 (1993) (a decision is not binding precedent where the majority did not concur in the underlying reasoning, but only in the result).

Plaintiff further argues that defense counsel advanced a "prototypical" prejudicial opening statement that was not corrected by the trial court. We decline to review this issue where plaintiff failed to state this issue in the questions presented. *Marx v Dep't of Commerce,* 220 Mich App 66, 81; 558 NW2d 460 (1996). Even if we were to review this claim, we would conclude that any prejudice caused by counsel's statement was eliminated by the trial court's instruction that the arguments and statements of counsel are not evidence. *Tobin v Providence Hosp,* 244 Mich App 626, 641; 624 NW2d 528 (2001).

Finally, plaintiff contends that the trial court was biased. In order to preserve this issue for appeal, a party must pursue a claim for disqualification before the trial court. *In re Schmeltzer,* 175 Mich App 666, 673; 438 NW2d 866 (1989). In this case, plaintiff did not seek disqualification in the trial court. Therefore, this issue is not preserved. Even if this issue were preserved, a review of the record fails to disclose support for plaintiff's claim that the trial court was partial towards defendants.

Affirmed.

/s/ Michael J. Talbot
/s/ Donald S. Owens
/s/ Karen M. Fort Hood